In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1581

CONTINENTAL CAN COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The findings of fact, conclusion of law and opinion of the Court of Claims (Pet. App. A1-A56) are reported at 422 F. 2d 405.

JURISDICTION

The judgment of the Court of Claims was entered on February 20, 1970 (Pet. App. A1-A56). The petition for a writ of certiorari was filed on May 18, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether can-closing equipment sold by petitioner to former lessees of such equipment, in accordance with a court decree under which petitioner agreed to enter the business of selling equipment, constituted property held primarily for sale to customers in the ordinary course of petitioner's business.

STATUTE INVOLVED

Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.):

> Sec. 117 [as amended by Sec. 151(b), Revenue Act of 1942, c. 619, 56 Stat. 798, 846, and Sec. 210(b), Revenue Act of 1950, c. 994, 64 Stat. 906, 933]. CAPITAL GAINS AND LOSSES.
>
> * * * *
>
> (j) *Gains and Losses from Involuntary Conversion and From the Sale or Exchange of Certain Property Used in the Trade or Business.*—
>
> (1) *Definition of property used in the trade or business.*—For the purposes of this subsection, the term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(*l*), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale

to customers in the ordinary course of his trade or business, or (C) a copyright, a literary, musical, or artistic composition, or similar property, held by a taxpayer described in subsection (a)(1)(C). * * *

STATEMENT

Petitioner manufactures metal containers for food, beverages, and other products. Prior to January 1, 1951, petitioner leased can-closing equipment to its customers at nominal rentals, under an arrangement whereby the user of the equipment was obliged to purchase its can requirements from petitioner. (Pet. App. A2-A3.)

On January 1, 1951, the provisions of an antitrust consent decree entered against petitioner took effect.[1] The stated purpose of the decree was "to assure to those interested in owning container closing machines * * * the opportunity to purchase such machines * * * owned or controlled by [petitioner] as of January 1, 1951," and with respect to equipment manufactured after such date, to assure that petitioner would "adopt a policy of affording to all those desiring such machines or equipment every available economic incentive to purchase such machines and equipment." The decree further provided that existing lessees should be advised, by a special communication, of their right to purchase (at prices calculated in accordance with a formula established in

[1] Petitioner opted for these provisions in lieu of complete divestiture of its can-closing equipment business (Pet. App. A3).

the decree) the closing machinery then in their possession. Thereafter, petitioner developed a program, including advertising materials, circulars, and specially prepared letters, to promote the sales of the equipment. (Pet. App. A4-A5.)

After January 1, 1951, when petitioner sold closing equipment manufactured or acquired before that date to customers who were not lessees in possession, it reported the gains as ordinary income. After January 1, 1951, when petitioner sold equipment manufactured or acquired *after* that date either to lessees in possession or to customers who were not then leasing the equipment, it reported the gains as ordinary income. However, gains from sales of closing equipment manufactured or acquired *before* January 1, 1951, and sold to *lessees in possession* as of that date were reported as gains from the sale of capital assets held for more than six months. During 1951 (here in suit) petitioner realized $4,005,899 in gross receipts from such sales and reported net gains of $1,720,639 as capital gain. (Pet. App. A5-A6.)

The Commissioner determined that the $1,720,639 gain for 1951 did not qualify for capital gains treatment since the closing equipment constituted "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business" under Section 117(j) of the 1939 Code, *supra*, pp. 2-3. After payment of the claimed deficiencies, with interest, petitioner filed a claim for refund which was disallowed, and this suit for refund followed (Pet. App. A6). The Trial Commissioner sustained the government, and his findings of fact and conclu-

sion of law were upheld by the Court of Claims with three judges dissenting (Pet. App. A1-A40).

ARGUMENT

The decision below is correct. There is no direct conflict or other warrant for further review.

1. The main thrust of petitioner's argument is that property originally acquired and held for a rental or nonsale purpose can never become property held by a taxpayer primarily for sale to its customers in the ordinary course of its business. This contention is without merit. Petitioner has not disputed that gains on all other sales of can-closing equipment —apart from sales to lessees in possession as of January 1, 1951—constituted ordinary business income. Implicit in this treatment is recognition that, although petitioner also continued to offer the machines for rent, it became engaged after January 1, 1951, in holding new and used machines primarily for sale to customers in the ordinary course of its business. This conclusion is inescapable in view of the antitrust decree requiring petitioner to engage in a vigorous campaign to sell machines.

Philber Equipment Corp. v. *Commissioner*, 237 F. 2d 129 (C.A. 3), upon which petitioner places major reliance (Pet. 5-6), is not in point. In that case, the taxpayer was in the business of leasing motor vehicles, and sold the vehicles after they could no longer be used in that business. The court, recognizing that the sales activities were merely part of the last phase of a cycle in the use of capital goods—the replace-

ment or sale of equipment no longer usable in the business itself—concluded that the vehicles were not held primarily for sale to customers in the ordinary course of business; rather the purchase, use and ultimate disposition of the vehicles were directed to the single purpose of the operation of a truck rental business.

In contrast, the sales of can-closing machines by petitioner in 1951 were not merely incident to or the final cycle of their use as rental equipment. Unlike the taxpayer in *Philber*, petitioner was in the everyday business of selling new and used can-closing machines beginning in 1951, and in pursuit of this business it offered machines once offered for rental only, to lessees in possession at preferential prices. It actively solicited sales and did everything in its power to hold itself out to customers as engaged in the business of selling machines. The sale of machines was not a natural concomitant to the rental business but the primary objective of a separate business engaged in after January 1, 1951.

Petitioner misreads the holding of the Court of Claims in this case when it asserts (Pet. 5):

> * * * the Court of Claims has insisted on determining the taxpayer's purpose from the circumstances at the moment of sale rather than during the full period from acquisition to sale. * * *

The holding below is not grounded in a change in purpose "at the moment of sale." As the Court of Claims sought to make clear, it is grounded in the change in petitioner's business which occurred on

January 1, 1951, when it agreed to enter the sales business on a regular basis by offering new and used machines for sale as well as for rental. Sales of machines made thereafter involved property "*held* by the taxpayer primarily for sale to customers *in the ordinary course of his trade or business.*" (Emphasis supplied.) Cf. *Recordak Corp.* v. *United States*, 325 F. 2d 460, 462 (Ct. Cl.); *Nadalin* v. *United States*, 364 F. 2d 431 (Ct. Cl.). Consequently, and in accord with this Court's holding in *Malat* v. *Riddell*, 383 U.S. 569, the profits arising from these sales made in the "everyday operation" of petitioner's business were properly determined to be ordinary income.

2. Petitioner maintains in the alternative (Pet. 7) that its sales of machines to lessees in possession were not in the ordinary course of its business because it was forced to enter the business of selling machines under the "compulsion" of an antitrust decree. Petitioner ignores the fact that the sales of its machines were not pursuant to the liquidation or divestiture of its can-closing equipment business. Indeed, petitioner resisted divestiture and itself opted for provisions in the decree which would place it in the business of *selling* as well as renting the machines (Pet. App. A13). It proceeded thereafter to engage in sales activities directed to the lessees in possession which were in every respect typical of a sales campaign carried on by a continuing business, rather than one in liquidation (Pet. App. A5). Under these circumstances, the Court of Claims was correct in holding (Pet. App. A13) that, insofar as petitioner was concerned, "this newly established equip-

ment sales portion of its overall business operations, conducted in accordance with the decree terms, would necessarily become its 'ordinary' business."

The argument made here by petitioner was advanced and rejected in *American Can Co.* v. *Commissioner*, 317 F. 2d 604 (C.A. 2), certiorari denied, 375 U.S. 993. The Second Circuit there held, as did the court below, that the reason why a taxpayer adopts its new method of doing business is unimportant. What is important is that in accepting the terms of the consent decree, petitioner put itself in the position of holding can-closing equipment for sale in the ordinary course of business.

3. Contrary to petitioner's assertion (Pet. 8-10), the holding of the Court of Claims, which recognizes that although petitioner continued to lease machines it commenced a regular and active business of selling machines, is entirely consistent with *Malat* v. *Riddell*, *supra*. In *Malat*, which did not involve a taxpayer engaged in two separate businesses, as was petitioner after January 1, 1951, this Court did not hold that a taxpayer engaged in the business of holding property for sale may avoid ordinary income treatment on the proceeds if he also conducts a business of holding property for rent.[2] The Court stated that Con-

[2] In *Malat* v. *Riddell*, the taxpayers acquired real property for the purpose of commercial development, intending its sale in bulk only in the event that their plans fell through and only "so they wouldn't get hurt." 383 U.S. at 571. This Court held that the latter purpose would not be sufficient to require ordinary income treatment unless it was the principal purpose for which the property was held. The only business con-

gress intended that all gains from transactions in property which arise from everyday business operations should be treated as ordinary income. The Court of Claims was fully justified on this record [3] in concluding that the gain in question fell within this category and thus constituted ordinary income.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
Assistant Attorney General.

THOMAS L. STAPLETON,
DANIEL B. ROSENBAUM,
Attorneys.

JULY 1970.

---

templated in *Malat* was the commercial development of the property, and the subsequent sale represented no more than its disposal after the business plan failed to materialize.

[3] Petitioner's regular business activities in respect of the sales in issue are set out in detail in the findings of fact (Pet. App. A49-A52).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 389259 820